

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

*Reg. Affidavit
Hearing*

77-2013

To be argued by
EDWARD R. KORMAN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-2013

LAWRENCE ALFANO,
Petitioner-Appellee,
—against—

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE RESPONDENT-APPELLANT

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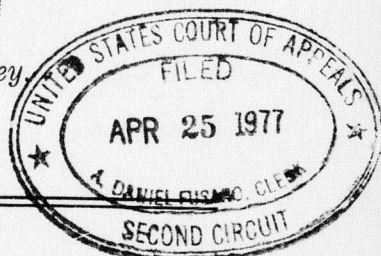


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Docket No. 77-2013

LAWRENCE ALFANO,
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UNITED STATES OF AMERICA,
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BRIEF FOR THE RESPONDENT-APPELLANT

Preliminary Statement

The United States of America appeals from an order of the District Court for the Eastern District of New York, Costantino, J., entered on January 24, 1977 (A. 767) which granted a motion filed pursuant to 28 U.S.C. § 2255 (A. 588) and set aside a judgment entered on December 5, 1975, convicting the defendant Lawrence Alfano of possession of stolen airline tickets in violation of 18 U.S.C. § 659.¹ The order setting aside the judgment

¹ The defendant received two concurrent one year sentences which he began serving June 1, 1976. On November 28, 1976, after almost two months of deliberation, Judge Costantino ordered the defendant released on bail pending the determination of this § 2255 petition to set aside the judgment of conviction. The defendant remains free pending this appeal.

of conviction was based on the fact that there had been an unexplained delay of eighty-days in obtaining an order sealing a wiretap conversation which had been admitted in evidence at his trial without any objection on this ground.

Statement of the Case

A. The Indictment and Pretrial Proceedings

1. On December 26, 1974, a grand jury sitting in the Eastern District of New York returned an indictment, No. 74 Cr. 818, charging the defendant with two counts of possession of five stolen airline tickets having a value in excess of \$100.00 which were stolen from a shipment moving in interstate commerce. Subsequently, on February 10, 1975, the defendant filed an omnibus motion (A. 5) asking that the indictment be dismissed and that conversations of the defendant which were obtained "as a consequence of indiscriminate electronic surveillance" by New York City Police, as to which he had received notice pursuant to New York Criminal Procedure Law 700.50(3), be suppressed (A. 11). The defendant also requested a bill of particulars and various items of discovery.

2. On April 15, 1975, apparently in response to the motion to dismiss based on defects in the indictment, a superseding indictment was returned alleging the same substantive violations of Section 659. The previously made motion to suppress the wiretap conversation recorded "on a telephone located in the defendant Alfano's place of business at 53-57 Metropolitan Avenue, at telephone numbers 382-9888 and 382-9889, among others" (A. 11), was set down for argument on May 9, 1975, along with similar motions in various related cases.

3. On May 9, 1975, apparently just prior to the start of the hearing, the Assistant United States Attorney, delivered various orders and supporting affidavits relating to the wiretap conversations which were to be used by the prosecution. One of these orders was an order directing the sealing of recordings "intercepted pursuant to a warrant over the telephone instruments bearing the number 382-9888 [and] 382-9889, known as plant numbers 2 and 3 respectively" (A. 769). This order, which was signed on March 5, 1974, clearly indicated that the wiretapping had terminated on December 10, 1973, some eighty-five days earlier.

Although the large batch of applications and orders were turned over just prior to the hearing, the defendant's counsel, Jonathan Rosner, had earlier been provided with a copy of the transcript of the single conversation which the United States intended to offer at his trial (A. 633). As he told Judge Judd in the following colloquy (A. 637-638):

MR. ROSNER: For the record, if I can get back to the tapes, Your Honor, I did receive from Mr. Cunningham eight sheets labeled "Plant No. 2 BNPMD, Reel 528, 7/7/73, 8/7/73. That's legible and I assume that's the only tap or recording Mr. Cunningham intends to introduce.

MR. CUNNINGHAM: [Assistant U.S. Attorney] That's right.

The defendant's counsel, however, asked that the "hearing be adjourned until counsel has had an opportunity to review [the additional materials] and perhaps then particularize [their objections]" (A. 638). Judge Judd agreed to grant an adjournment until May 15, 1975 (A. 640).

4. On May 12, 1975, the defendant's counsel filed a "supplemental affidavit" in support of the motion to sup-

press (A. 645). The affidavit went on to say (A. 648-649):

On May 9, 1975, together with counsel for the Government and counsel for other defendants whose indictments arose out of the chain of eavesdropping warrants and orders outlines above, I appeared before the Court for a "hearing" on the several motions to suppress. Much of the material affording counsel the information with respect to the eavesdropped conversations was not furnished by the Government until the commencement of the "hearing". During the colloquy in respect of the motions to suppress, the Court indicated that the defendant Alfano lacked the requisite standing in respect of any and all conversations, warrants, order, and applications prior to those numbered "10.", "11." and "12." above, since only those warrants, orders and the applications incidental to them revealed conversations to which the defendant Alfano was a participant, *and only the one numbered "11." had to do with the single conversation of the defendant Alfano that the Government intended to offer into evidence.* Moreover, the Court further indicated that as the orders, warrants and applications appeared sufficient on their face, and since another member of this Court had presumably found the eavesdropping lawful in related matters, absent a demonstration on the part of the defendant Alfano and other defendants similarly situated, the Court would not conduct an evidentiary hearing [Emphasis supplied].

The affidavit went on to dispute Judge Judd's suggestion with regard to the defendant Alfano's lack of standing and to assert various challenges to the earlier

wiretap orders. The affidavit, however, did not raise any issue in regard to the delay in sealing even though it is apparent that by this time defense counsel knew that the single taped conversation came from the order, referred to in his affidavit as "number 11", which authorized the tapping of telephone number 382-9888 and 382-9889.²

Mr. Rosner's affidavit concluded with the following statement (A. 650-651):

At the conclusion of the "hearing" on May 9, 1975, the Court indicated it would hear counsel further in respect of particularization of claims arising out of the warrants, orders and applications, on May 15, 1975, at 2:30 P.M. As I indicated at that time, I am scheduled to commence a trial in Supreme Court of the State of New York, County of New York, **** on *** May 13, 1975. I have just [been] *** advised that the trial is in fact to commence on Tuesday, May 15, 1975, and will thus be unable to attend the Court on May 15, 1975 at 2:30 P.M.

In light of the foregoing, and the rulings of the Court in respect of the motion to suppress on behalf of the Defendant Alfano, I will respect the rulings of the Court both as to suppression, partic-

² We make a point of emphasizing this because a partial excuse later offered by Mr. Rosner for not timely raising the sealing issue was the confusion caused by the fact that the transcript of the conversation, originally provided to him, erroneously listed the telephone number from which it was taken as 497-9408 (A. 796). Mr. Rosner, of course, had never suggested prior to or at trial that he had any difficulty in placing the conversation with the proper order: nor did the defendant's present counsel who prepared the Section 2255 petition have any such problem (A. 592).

ulars and discovery, letting the record stand as it presently does, and indicate to the Court that I am not in a position to prepare further for trial. Thus, the Court may indicate as it desires a date for trial consistent with my other trial commitments.

5. On July 25, 1975, Judge Judd filed a Memorandum and Order denying the motion to suppress the wiretap evidence (A. 88-91); his opinion, of course, did not allude to the alleged delay in sealing because it had not been raised by Mr. Rosner, or counsel for the defendants in the related cases, who appeared for the hearing on May 15, 1975 (A. 30). Moreover, Judge Judd also directed the parties to appear to fix a date for trial. The date ultimately selected was October 21, 1975—over five months from the date on which the defendant's counsel had received the various orders and applications, including the sealing order which he had obviously read and examined.³

6. Not only was no issue raised prior to October 21, 1975, regarding the alleged delay in sealing, but equally significant to the argument which we shall make here, no claim was ever made that the tape of the conversation had been tampered with; indeed, Mr. Rosner stipulated that the voice was that of Mr. Alfano (A. 272) and, as will be seen, the defendant called as a witness the other party to the conversation who in the course of explaining what she meant by the damaging language she used, added additional testimony attesting to the accuracy of the recording (A. 412-449).

³ The sealing order provided to Mr. Rosner did not contain the underlying affidavits on which it was based. Mr. Rosner wrote on the top of his copy of the order: "No underlying papers" (A. 769).

B. The Trial

So that the issue raised may be seen in the context of the entire case, we set forth a brief summary of the evidence at trial. The indictment, as noted earlier, charged Lawrence Alfano with possession of five airline tickets stolen from an interstate shipment of freight. The evidence established that two of the tickets contained the names of Alfano's children and were used on a June 24, 1973 flight from New York to Fort Lauderdale, Florida. Three tickets were made out to members of a family named Maltese and were used for a flight from New York to Miami on July 23, 1973. The five tickets had been stolen in April and May, 1973 from two shipments of blank tickets originating in Tennessee and destined for Newark, New Jersey. Alfano's grand jury testimony, introduced into evidence during the trial, contained an admission that his children had used two of the tickets, that he had given tickets obtained from the same source (one Michael Argondizzo) to the Maltese family and, in fact, obtained tickets similarly for other friends and his own use, at attractive discount prices (A. 274-291).

The United States also introduced, as proof of a similar act, the now disputed telephone conversation between the appellant, and one Judith Varisco, who was apparently interested in purchasing airline tickets from him. The telephone conversation began with a discussion between the two of a projected purchase by June through appellant of discount tickets from a man named "Mike." Alfano states "I got [Mike] right here now" (A. 652). There is discussion of the seller's requirements that money for the tickets be paid in advance. Alfano states that it is the practice of the seller to deliver the tickets "about

the day before" they are to be used. There then occurs the following sequence in the conversation (A. 657):

June: Now let me ask you something though.

Appellant: What?

June: If I get nailed with them . . . what am I out the bread?

Appellant: Ah well it's all according how it happens. There should be no reason you should get nailed, there's only one way you could possibly get nailed with them . . . You lost the ticket, if you try for a refund then you gotta get nailed . . . that's about the only way I heard of anybody ever having a problem with these things.

June: But just flying with them, you got nothing to sweat.

Appellant: No problem, I just came back myself, I took my whole family, and I would never do that if I didn't think it was sure, right?

Toward the end of the conversation there was reference to a money-in-advance requirement for purchase of tickets (A. 658):

Appellant: He can't get the tickets without cash. How's he gonna get, ticket, get em without the people he gets it from want to get paid . . . Now I collect it from the people, that I, I give em to, then it's my problem you know . . . But in the meantime, he's got to have his money.⁴

⁴ The defendant's counsel did object to the admission of this evidence on the ground that it was a subsequent criminal act and not relevant. (A. 324-325).

The defendant then called the other party to the conversation, June Varisco, as a defense witness. She admitted that she was the other party to the conversation. She stated that a man named Wally had put her in touch with a man named "Mikie", who had sold her the tickets. At the time of her purchase "Mikie" presented her with a card from a travel agency. During cross-examination Ms. Varisco attempted to explain the telephone conversation: she was afraid of losing her money if she paid in advance (A. 430); she did not learn that defendant was selling tickets until the recorded conversation took place (A. 434); she did not know why tickets could not be issued in advance of payment (A. 437); her "get nailed" reference stemmed from her reluctance to receive a full-value refund when she had purchased the tickets at a discount (A. 443).

The jury, needless to say, did not credit this story, and convicted the defendant of both counts of the indictment. On December 5, 1975, the defendant was sentenced to two concurrent one year sentences (A. 551).

C. The Appeal

The defendant took an appeal from the judgment of conviction. In his twenty page brief (A. 563-585) he argued that the documents received in evidence were not properly authenticated (A. 572) and that the taped conversation was not properly admitted because it occurred after the time in which the defendant was alleged to have possessed the stolen airline tickets at issue and was not relevant to his state of mind on the earlier occasion (A. 581). No other claims were raised.

The judgment of conviction was affirmed without opinion on May 6, 1976 and the defendant surrendered to serve his sentence on June 1, 1976.

D. The Section 2255 Petition

On June 27, 1976, in *United States v. Gigante*, 538 F.2d 502 (C.A. 2, 1976), a "case of first impression in our Circuit", 538 F.2d at 506, this Court affirmed a pre-trial order suppressing certain wiretap evidence on the ground that it had not been timely sealed as required by Section 2518(8)(a).⁵ Similarly in a related proceeding on July 15, 1976, in the New York Supreme Court (Kings County), Mr. Justice Mollen, relying on *United States v. Gigante, supra* (A. 708-710) granted a pretrial suppression motion, suppressing conversations obtained from the same telephones as the one here in issue on the ground that there had been unexplained delay in sealing (A. 660, 714-715).

Before the ink was dry on these opinions, the defendant retained new counsel, who obtained copies of the various materials that had been turned over to Mr. Rosner. On August 31, 1976, a motion was filed pursuant to Section 2255 of Title 28, to set aside the judgment of conviction on the ground that the single wiretap conversation should have been excluded because of the delay in obtaining a sealing order (A. 586). The United States argued that habeas corpus relief did not lie with respect to an error of this kind, in the absence of any claim that the tapes had been tampered with (*Davis v. United States*, 417 U.S. 333 (1974)), and that even if such relief was available, the failure to raise the issue prior to or at trial constituted a waiver under

⁵ Section 2518(8)(a) provides, *inter alia*, that:

The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom * * *".

F.R.Crim.P., Rule 12(f). The district court, however, held that if there was an unexplained delay in sealing then the defendant was entitled to have the judgment of conviction set aside.

In a memorandum filed on December 21, 1976, Judge Costantino rejected the argument that habeas corpus relief was not appropriate (A. 762-763):

In *Davis v. United States*, 417 U.S. 333, 346 (1974) the Supreme Court held that collateral relief under § 2255 is available for non-constitutional claims when the asserted error is "a fundamental defect which inherently results in a miscarriage of justice" and where "exceptional circumstances" make the necessity of collateral relief apparent. The failure to suppress a wiretap not authorized in conformity with the requirements of 18 U.S.C. § 2518(10)(a) has been held to constitute a "fundamental defect." See *United States v. Consiglio*, 391 F. Supp. 564 (D. Conn. 1975). A violation of the type raised in *Consiglio*, while a statutory violation, is clearly not an error which goes to the "integrity" of the evidence. Cf. *Stone v. Powell*, — U.S. —, 96 S.Ct. 3037 (1976). The failure to present a wiretap for judicial sealing, however, is an error that does go to the integrity of the evidence. Wiretaps "lend themselves to diabolical fakery." *Lopez v. United States*, 373 U.S. 427, 468-469 (1963) (Brennan, J., dissenting); *United States v. Gigante*, *supra*, at 505. And the requirement of immediate judicial sealing is an integral part of the congressional scheme to preserve the integrity of the tapes. *United States v. Gigante*, *supra*.

Moreover, Judge Costantino also rejected the claim that issue had been waived by the failure to timely raise the claim. Judge Costantino reasoned that waiver was not deliberate, but instead appears to have been a result "of one or both of two causes": (1) inadequate opportunity to examine or develop the relevant facts, and (2) inadequate representation by counsel (A. 765).

The "inadequate opportunity" which Judge Costantino alluded to was the fact that Mr. Rosner did not receive the wiretap affidavits and orders until May 9, 1975, and was not given a sufficient period of time to examine them (A. 764). Moreover, as evidence of the alleged inadequacy of counsel, Judge Costantino observed that, although Mr. Rosner was aware that suppression motions had been filed in the New York State Court proceeding, he did not familiarize himself with grounds for those motions, and that prior to filing the brief on appeal—which took place before the ruling in *Gigante* or the related New York State proceeding—he wrote the defendant a dunning letter complaining he had not been paid and declaring that (765):

We shall complete the appeal on your behalf since we have indicated to the Court we will do so, although I must state that I do not do it with any great degree of interest, and also indicate that we will not, under any circumstances, engage in any post-appeal motions which we had earlier discussed, in the event your conviction is affirmed.

Judge Costantino concluded, as a consequence, that (A. 765).

It is not necessary to determine whether the failure to raise the sealing issue coupled with the "disinterest" of the attorney in this case rise to the level of inadequate representation. See *Lunz*

v. *Henderson*, 533 F.2d 1322 (2d Cir. 1976). For it is clear that, when the quality of representation is examined in conjunction with the failure to provide adequate time prior to hearing for the examination of the wiretap order, see *Kaufman v. United States*, 394 U.S. 217, 227 (1969), "exceptional circumstances" are present warranting habeas corpus relief. *Davis v. United States*, *supra*.

Accordingly, Judge Costantino indicated that he would hold a hearing to determine whether there was an unexplained delay in the sealing of the tapes.

E. The Hearing

1. On January 18, 1977, the date of the hearing, the United States advised the district court that it would not contest the allegation that there was no legally sufficient excuse to justify the delay in sealing the tapes by the New York law enforcement officers who conducted wiretapping, although it continued to adhere to the view that this fact alone did not justify granting the relief pursuant to Section 2255 (A. 752-753).

2. The United States, however, offered into evidence the underlying affidavits that had been submitted in support of the application for the late sealing order. The affidavits established that prior to the application, the originals of the tapes "were secured in the Brooklyn North Public Morals Office, Kings County, marked for identification with 'Plant Number 213,' and kept under lock and key at all times" (A. 738). The original tapes were removed by named law enforcement officers "only for the purpose of duplicating said tapes" (A. 738), and each named law enforcement officer also submitted affidavits stating that they had not in any way altered the tapes (A. 740-749).

Moreover, the sealing order itself, which was also admitted into evidence, was prefaced, *inter alia*, with the following findings (A. 731).

Appearing that a code name was assigned to the conversations intercepted over the telephone instruments bearing the numbers 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3," and it further

Appearing that the original tape recordings made of conversations intercepted over telephone instrument bearing the numbers 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3," were kept under lock and key at all times while in the custody of CAPTAIN CARNEY, * * *

Appearing that the original tape recordings of conversations intercepted over telephone conversations 382-9888 and 382-9889, known as "PLANT NUMBERS 2 & 3" have not been altered, changed, nor any additions made therefrom * * *

3. The United States also offered into evidence an affidavit by Jonathan Rosner, the defendant's original trial and appellate counsel, in which he denied that his failure to raise the issue was due in any way to any disinterest on his part. He observed that (A. 727-728):

Prior to preparation of the brief on behalf of the Defendant-Appellant Alfano I reviewed the record and discussed with other attorneys in our office issues to be presented, including issues relating to the eavesdropping, and a determination was made not to present to the reviewing court any issues relating to eavesdropping. However, since we had not focused on the sealing defect now apparent, that issue was not considered by us, the eavesdropping issues considered being limited

to the manner in which the Court disposed of the legality of the conversation to be offered against Defendant-Petitioner Alfano. Unfortunately, the state court determination was apparently not made until after conclusion of the state court hearings which themselves were not concluded until after trial of Mr. Alfano, and that determination was never communicated to me either before or subsequent to the appeal from the judgment of conviction.

Mr. Rosner continued (A. 728-729):

To the extent that I communicated to Defendant-Petitioner Alfano by letter dated February 25, 1976 as quoted in the moving papers and this Court's Memorandum and Order that our prosecution of the appeal on his behalf would be without substantial interest, I now regret that my words were not well chosen but rather the result of a series of broken promises by the Petitioner-Defendant Alfano in respect of our relationship with him. I do say, categorically, that our representation of Defendant-Petitioner Alfano was not in any way the result of his failure to compensate us for work performed, nor was it affected by our relationship with the Defendant-Petitioner Alfano in any manner other than as heretofore indicated.

After the hearing, Judge Costantino filed a brief written order which granted the motion to set aside the judgment of conviction and ordered a new trial at which "the challenged wiretap shall be suppressed" (A. 767).

ARGUMENT

The Claim Raised By The Defendant May Not Be Asserted In A Section 2255 Proceeding.

A. Introduction

Our argument here, as it was in the district court, is that claims which are not of constitutional dimension, may be raised in a habeas corpus proceeding or in a Section 2255 proceeding "only if the alleged error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Stone v. Powell*, — U.S. —; 96 S.Ct. 3037, 3043, n.10 (1976). We believe that the alleged error here is not of this kind, and that habeas corpus relief must be denied.

We also argued in the district court that F.R.Cr.P. Rule 12(f), provided an independent ground for denying the application, since it provides that any motion to suppress which is not timely made is waived unless, for cause shown, relief is granted from the waiver. This, of course, applies to constitutional and non-constitutional claims, and does not depend on any inherent limitation on the scope of the writ. See, generally, *Davis v. United States*, 411 U.S. 233 (1973); *United States v. Mauro*, 507 F.2d 802 (C.A. 2, 1973), *cert. denied*, 420 U.S. 991.

We do not press the waiver argument here because it is redundant. If we are right that the defendant has failed to meet the prevailing "miscarriage of justice standard" for obtaining habeas corpus relief, then we do not need to rely on F.R.Crim.P., Rule 12(f). On the other hand, if we are wrong and that standard has been met, then cause will have been shown for relief from the waiver provisions of F.R.Crim.P., Rule 12(f). Cf. *United States v. Williams*, 544 F.2d 1315, 1218-1219 (C.A. 4, 1976).

Accordingly, we proceed directly with a discussion of the scope of the relief available in a Section 2255 proceeding.

B. The Scope Of Relief Permitted By Section 2255

The law regarding the scope of the relief available for non-constitutional claims in a Section 2255 proceeding is no longer the subject of serious dispute. In *Davis v. United States*, 417 U.S. 333 (1974), the Supreme Court was "quite explicit in denying that 'every asserted error of law can be raised on a Section 2255 motion.'" *United States v. Travers*, 514 F.2d 1171, 1178 (C.A. 2, 1974). As the Court observed in *United States v. Wright*, 524 F.2d 1100, 1101-1102 (C.A. 2, 1975), in holding that Section 2255 did not afford a remedy in circumstances almost identical to that here:

Not every error of law may be successfully asserted in proceedings under this section; the error must be a fundamental one which inherently results in a complete miscarriage of justice. *Davis v. United States*, 417 U.S. 333, 346 (1974). Furthermore, where constitutional issues are absent, a defendant who fails to request relief patently available to him on the trial or through regular avenues of appeal may be precluded [absent exceptional circumstances] from subsequently securing it through collateral means. *Sunal v. Large*, 332 U.S. 174, 178 (1947); *United States v. West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974).

* There it was held that failure of the Attorney General or an Assistant Attorney General to authorize an application for a wiretap order, which would require suppression, if a timely motion was made, did not "rise to the magnitude to justify relief under Section 2255 where none was sought before" (524 F.2d at 1102). Accord: *Zangarino v. West*, 422 F.Supp. 812 (E.D.N.Y. 1976).

Accord: *United States v. Travers*, 514 F.2d 1171, 1178 (C.A. 2, 1974); *Bell v. United States*, 521 F.2d 713 (C.A. 4, 1975), certiorari denied, 424 U.S. 918 (1976); *McRae v. United States*, 540 F.2d 943, 947 (C.A. 8, 1976); *Gates v. United States*, 515 F.2d 73 (C.A. 7, 1975), *Bachner v. United States*, 517 F.2d 589, 599 (C.A. 7, 1975), (*Stevens*, J., concurring); *Timmerick v. United States*, 423 F. Supp. 537 (E.D. Mich., 1976).

Quite plainly, it seems to us, the defendant has not come close to meeting this standard here. The defendant was convicted after a trial in which the evidence of his guilt was not questioned and which otherwise was error free. While it is true that the evidence of a wiretapped conversation was admitted, which upon a timely objection would have been excluded, there has never been any claim that the tape was altered and, indeed, the defendant's own witness at trial attested to its accuracy (A. 412-449). Under these circumstances, it is as "absurd to say" here (*United States v. Travers*, *supra*, 514 F.2d at 1178), as it was in *United States v. Wright*, *supra*, 524 F.2d 1100, that the mere fact there was an unexplained delay in sealing the tapes constitutes "a complete miscarriage of justice" which present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis v. United States*, *supra*, 417 U.S. 433. Compare, *United States v. Williams*, 544 F.2d 1215, 1218, 1219 (C.A. 4, 1976).

In making this argument, of course, we do not denigrate the importance of the sealing requirement which is "designed to insure that absolutely no subsequent alteration of the records occur" *United States v. Gigante*, *supra*, 538 F.2d at 506. But it does not follow that, because there has been a delay in sealing the tapes, the tapes have been altered. While the desire to encourage full compliance with strictures of the wiretap statute justify excluding

such evidence at trial, pursuant to a timely objection, the failure to comply with the sealing requirement—absent of claim of tampering, simply does not rise to the level of an injustice, much less a “complete miscarriage of justice”. Moreover, to the extent that the sealing requirement is intended to ensure that adequate records will be kept on compliance with other provisions of Title III or the Fourth Amendment, such as the provision for minimization, see *United States v. Gigante*, 538 F.2d at 505, our argument applies with even greater force. Since it is now plain that even if a violation of the Fourth Amendment were shown, the exclusionary rule may not be invoked in a habeas corpus proceeding [*Stone v. Powell*, — U.S. 96 S.Ct. 3037 (1976)], it follows that a habeas corpus proceeding is hardly the place to complain for the first time about a failure to comply with a procedural rule designed to enable a defendant to determine whether the exclusionary rule provided by statute or the Fourth Amendment should have been invoked at trial. See *Zangarino v. West*, 422 F. Supp. 812, 819 (S.D.N.Y. 1976).

While it is true that any tampering with the substance of the tapes would affect the integrity of trial, there has been no claim of tampering. On the contrary, the evidence introduced by the defendant at trial confirmed the accuracy of the tapes. Moreover, the affidavits introduced by the United States at the hearing, affirmatively established that there has been no such tampering and no “miscarriage of justice.”

There is, of course, lurking in the record the charge that the failure to raise the issue was somehow due to the inadequacy of counsel. As Judge Moore aptly observed in *United States v. West*, 494 F.2d 1314, 1315 (C.A. 2. 1974), “successor counsel, so frequently believing that they have discovered a hitherto unargued point, unhesitatingly level this charge at their brethren of the Bar.” The claim, however, does not add anything to defendant’s

right to raise the sealing issue, a non-constitutional claim, in a habeas corpus proceeding. The very fact that the error itself did not deprive the defendant of a fair trial or result in a "complete miscarriage of justice" necessarily means that the failure of counsel to focus on this issue did not rise to a level warranting habeas corpus relief. *Lunz v. Henderson*, 533 F.2d 1322, 1337 (C.A. 2, 1976); *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 42 (C.A. 2, 1972), certiorari denied, 410 U.S. 917 (1973). Moreover, because "[r]esort to habeas corpus, especially for purposes other than to insure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government" (*Stone v. Powell*, — U.S. —, 96 S.Ct. 3050, n.31), the claim that counsel has not been adequate must also be limited in habeas corpus proceedings to certain kinds of cases. As Judge Friendly has observed:

I would not be inclined to apply the same rule of automatic entitlement to collateral attack to *all* cases where the claim is lack of effective assistance of counsel—a claim that is bound to be raised ever more frequently as claims of total lack of counsel diminish in the course of time. I would assimilate cases where the state is alleged to have *prevented* counsel from doing his job—for example, by forcing him to trial without adequate opportunity for preparation, as in *Powell v. Alabama*, 287 U.S. 45 (1932)—to those where counsel was not provided at all. It is tempting to extend this principle to other cases where the ineffectiveness of counsel is flagrant and apparent. But the difficulty of drawing a line between such cases and the more frequent claims of ineffectiveness by hindsight would lead me to place all these in the category where a colorable showing of innocence should be required.

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chic. Law Review, 142, 152, n.46.⁷

The present case plainly involves a claim of "ineffectiveness by hindsight" which should require something more to justify collateral relief than the mere failure of counsel to raise objection to an item of evidence, the accuracy, relevancy and authenticity of which are not questioned. Compare *United States ex rel. Allum v. Twomey*, 484 F.2d 740, 745-746 (C.A. 7, 1973), Stevens, J. While Judge Constantino did suggest that counsel was not provided with a sufficient opportunity to review the various orders and affidavits, it is plain that this "finding" is clearly erroneous. The materials, as we have shown, were turned over on May 9, 1975, and the trial did not take place until October 21, 1975. The sealing issue was not raised before trial, for the same reason that it was not raised on appeal, because the defendant's lawyer did not focus on it. This, without more, does not entitle him to relief.⁸

⁷ Judge Friendly's article in the University of Chicago Law Review was cited on more than one occasion in *Stone v. Powell*, *supra*, (see 96 S.Ct. 3044, n. 13, 3050, n. 31). See also, *Schneklloth v. Bustamonte*, 412 U.S. 218, 265-266 and n. 12, concurring opinion of Powell, J. (1973).

⁸ We believe that several factors should be noted in defense of Mr. Rosner, the defendant's trial counsel. First, this was not a case in which there was no order sealing the tapes; it was only a delayed order. Second, the issue whether the exclusionary rule should be applied in such a case was "one of first impression in our Circuit" when *United States v. Gigante*, *supra*, was decided (538 F.2d at 506), and, indeed, the holding in *Gigante* was inconsistent with the holding of the Court of Appeals for the Third Circuit on this issue. *United States v. Falcone*, 505 F.2d 478, *cert. denied*, 420 U.S. 955 (1975). Finally, an examination of the trial transcript and the brief on appeal shows that Mr. Rosner's conduct was thoroughly professional and highly competent. His failure to raise the issue indicates that he was not perfect, not that he was inadequate.

CONCLUSION

The order of the District Court should be reversed.

Dated: March 28, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 22nd day of April 1977 he served a copy of the within

BRIEF FOR THE RESPONDENT-APPELLANT

by placing the same in a properly postpaid franked envelope addressed to:

Michael G. Dowd, Esq.
Manton, Pennisi, Dowd & Schwartz
120-10 Queens Boulevard
Kew Gardens, New York 11415

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

22nd day of April 1977
Carolyn M. Johnson

CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-461798
Qualified in Queens County
Term Expires March 30, 1981